

Attorney General

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Robert R. Corbin

September 30, 1987

Mr. James E. Moss, Executive Director  
Arizona Historical Society  
949 East Second Street  
Tucson, Arizona 85719

Re: I87-119 (R85-118)

Dear Mr. Moss:

You have asked several questions pertaining to the extent to which functions of the Board of Directors ("Board") and officers of the Arizona State Historical Society ("Society") may delegate duties to administrative staff or local chapters of the Society. We conclude the various discretionary functions about which you inquire cannot lawfully be delegated to staff, committees or local chapters, for approval by the Board or officers subsequent to the performance of those functions.

First, you ask whether the Society's treasurer may delegate his duties to the Society's administrative staff of state employees while monitoring the staff's activities. We conclude that the treasurer may not delegate his duties which involve the exercise of his discretion. A.R.S. § 41-821(E) outlines the treasurer's duties:

The treasurer shall have custody of the funds of the society, other than legislative appropriations. He shall hold the funds of the society coming into his hands in trust for the society's use and for the benefit of the state and shall disburse them only as prescribed by the law and the bylaws of the society.

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Powers granted to a governing body cannot be subdelegated, or transferred from the heads of agencies to their subordinates, unless specifically authorized by legislation. Peck v. Board of Education of Yuma Union High School, 126 Ariz. 113, 115, 612 P.2d 1076, 1078 (App. 1980); Board of Education v. Scottsdale Education Ass'n, 17 Ariz.App. 504, 511, 498 P.2d 578, 585, vacated on other grounds 109 Ariz. 342, 509 P.2d 612 (1973); Ariz.Atty.Gen.Op. 180-70; Ariz.Atty.Gen.Op. 185-112. An administrative agency or commission must work within its statutory authority; not to do so is an usurpation of the legislature's powers. See Swift & Co. v. State Tax Commission, 105 Ariz. 226, 230, 462 P.2d 775, 779 (1969).

In Peck, the school district governing board had delegated to its superintendent the responsibility for not renewing probationary teachers' employment contracts. 126 Ariz. at 114, 612 P.2d at 1077. The court noted that A.R.S. § 15-252 allowed the board to delegate to its superintendent the ministerial task of notifying the teacher of the board's intention to not renew that teacher's contract. Id. The Court of Appeals held that since the "board's intention" must be a collective determination of the board, allowing the board to delegate this function would circumvent statutes. Id. at 115, 612 P.2d at 1078.

In Board of Education, the Court of Appeals held that collective bargaining agreements between school boards and teachers' unions constituted an illegal delegation of power by the school board. 17 Ariz.App. at 511, 498 P.2d at 585. The court stated:

where, as in Arizona, the power to manage and control the affairs of the school district lies exclusively with the board of trustees, except where that power has been by specific legislation granted to someone else, the Board may not delegate that authority without specific legislative authorization.

Even if delegation of power is not specifically authorized by legislation, purely ministerial, non-discretionary powers and duties may be delegated by a governing body. See Peck, 126 Ariz.App. at 115, 612 P.2d at 1078; Ariz.Atty.Gen.Op. 185-112; Ariz.Atty.Gen.Op. 180-70.

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Unless the agency is delegating purely ministerial functions, the responsibility to act lies with the agency given power by the legislature. Ariz.Atty.Gen.Op. I80-70.

Whether an act is ministerial or discretionary is a factual determination. In El Paso Natural Gas Co. v. State, 123 Ariz. 219, 221, 599 P.2d 175, 177 (1979), the Arizona Supreme Court stated that "ministerial acts leave nothing to discretion for the duty and manner of performance are described with certainty." In Ariz.Atty.Gen.Op. I80-70, we determined that the State Community College Board could not delegate to district governing boards the authority to lease property because of the variables involved, such as selecting the property and setting rental payment amounts.

A.R.S. § 41-821(E) requires the Society's treasurer to have "custody" of the non-appropriated funds to disburse those funds "only as prescribed by law and the by-laws of the society." One court has defined "custody" in this context as having "immediate charge and control under the law." Territory v. Matson, 16 N.M. 135, 113 P.2d 816, 818 (1911). This language indicates that the treasurer has a certain degree discretion which he must exercise in handling non-appropriated Society funds. The treasurer must decide when to disburse funds as authorized by statute prior to their being disbursed. We conclude, therefore, that the treasurer may not delegate those duties to administrative staff. Administrative staff may handle the ministerial functions necessary to carry out his decisions.

Second, you ask whether under A.R.S. § 41-821(G) the Arizona Historical Society Board may delegate authority to the Society's administrative staff or finance committee to pay claims. A.R.S. § 41-821(G) states:

All expenditures of legislative appropriations to the society shall be made upon claims duly itemized, verified and approved by the board which shall be presented and filed with the director of the department of administration who shall draw his warrant therefor on the state treasurer.

(Emphasis added.) The statute clearly requires that the Board collectively itemize, verify and approve all claims before the department of administration director may draw a warrant. As

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with your first question, this duty involves discretion, the choice of whether to pay bills and commit funds, so it is not delegable to administrative staff or a finance committee. The finance committee may prepare information and make recommendations to the Board prior to its decision or action being taken.

Third, you ask whether the Board may delegate "fiscal responsibilities" to local chapter boards and allow the chapter boards to spend the private funds they raise on the projects they deem to be significant. You point out that at least two members of the chapter boards are also members of the state board. These chapters are local sectors of the society divided geographically which sponsor fund-raising activities and participate in special localized programs.

A.R.S. § 41-821(F) provides that:

The board of directors shall hold in trust for the state and administer for the benefit of the state and use of the society all property acquired by the society.

(Emphasis added.) Only the treasurer of the Society may disburse society funds. A.R.S. § 41-821(E). The statute clearly provides that the Board is responsible for spending state funds and the local chapters have no such statutory authority if the funds they have raised are the property of the Society. Although the chapters may recommend those projects they consider significant, they may not obligate or disburse funds without Board approval. Selecting projects for funding is a highly discretionary function of the board and as such may not be delegated to staff members or other bodies, despite the overlapping membership.

In conclusion, the discretionary functions assigned to the Board and treasurer by statute may not lawfully be delegated to staff members, committees or local chapters.

Sincerely,



BOB CORBIN  
Attorney General

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